United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7230

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN

vs.

COMMERCE AND INDUSTRY
INSURANCE COMPANY

U. S. District Court, District of Connecticut,
Civil No. B 74-330

U. S. Court of Appeals, Second Circuit,
Civil No. 75-7230

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF PLAINTIFF-APPELLEE

June 30, 1975

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ISSUE PRESENTED

Whether the District Court erred in granting a summary judgment in favor of the plaintiff where cross motions for summary judgment were filed by both plaintiff and defendant, each party representing that there exists no genuine issue of material fact.

STATEMENT OF THE CASE

This is an appeal by the defendant, Commerce and Industry Insurance Company, from a judgment of the United States District Court for the District of Connecticut (Clarie, J.), granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.

STATEMENT OF FACTS

Promptly after a fire occurred on premises owned by appellee and insured by appellant, appellee caused notice of such loss to be given to appellant and, on December 14, 1972, filed with appellant a proof of loss statement (Exhibit B to the Complaint) showing an actual loss in the amount of $247,265.00. Appellant refused to accept appellee's claim and refused to offer appellee any compensation whatsoever for the loss.

Appellee then invoked the appraisal procedure under the terms of its insurance policy and submitted to appraisal the sole question of the replacement cost of the building. Under the replacement cost endorsement to the policy of insurance, appellee had an election to seek reimbursement under the policy of either the "replacement cost" or the "actual cash value" of the property insured. (Appendix, p. 28)(See paragraph 6 of "Replacement Cost Coverage Endorsement", page 18 of Exhibit A to Complaint, and "Requirements in Case of Loss", page 6 of Exhibit A to Complaint; Appendix, page 28.) Appellee made her election in favor of the replacement cost endorsement but, in direct contravention of the terms of the insurance policy, appellant advised her that the appraisal could not go forward unless the question of actual cash value was determined **as well as** the question of replacement cost, and appellant ordered its appraiser

to stop all work in connection with the appraisal. (Paragraph 6 and 7 of Complaint; Appendix, pp. 2, 3.) Appellant continued to refuse to pay any amount to appellee despite the fact that she was obligated under the terms of her lease with her tenant, Sears, Roebuck and Company, to construct new premises, and was obliged to advance substantial sums to honor this obligation. (Paragraph 8 of Complaint, Appendix p. 3.)

On August 2, 1973, to resolve the entire dispute between the parties, appellee and appellant, both represented by counsel, entered into a settlement agreement, wherein they agreed to a compromise of their respective positions in full and final settlement of appellee's claim, and to a waiver of their respective rights under the policy of insurance, in consideration of appellant's unconditional promise to pay $187,500.00; $150,000.00 upon execution of the agreement, and the remaining $37,500.00 when the walls and roof of the new building were completed. Appellant refused to pay the final $37,500.00 at the time specified in the settlement agreement. (Paragraphs 9, 10, 11 and 12 of Complaint, Appendix, pp. 3, 4.)

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED, ON THE BASIS OF ALL OF THE EVIDENCE BEFORE IT, THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

This is an action to enforce the settlement agreement dated August 2, 1973, according to its terms. It is not an action on the policy of insurance.

The cross motions for summary judgment filed by the parties in the District Court resolve themselves therefore, into a relatively straightforward issue of construc-

tion of the writing embodying the settlement agreement.

The terms and conditions of any prior agreements between the parties, including those of the policy of insurance, are merged into and superseded by the settlement agreement and are therefore irrelevant to this dispute. **Riverside Coal Co. v. American Coal Co.**, 107 Conn. 40, 44-45 (1927); 17 **Am. Jur. 2d, Contracts**, sec. 483, (1964); 15 **Williston on Contracts**, sec. 1875 (Jaeger Ed., 1972); and, **Restatement of Contracts**, sec. 443 (1932).

The language of the settlement document itself is ample evidence that the parties intended it to be the repository of their full, final and binding agreement:

> "1. In consideration for payment by insurer to insured of $187,500.00 the parties for themselves, their successors and assigns, agree to remise, release and forever discharge any and all claims which they may have against each other arising under the above-mentioned insurance policy including, but not limited to, insured's claim in connection with the above-mentioned fire loss."

Appellee sued to enforce the settlement agreement according to its express provisions. Appellant urged the District Court to read into the settlement document certain terms and conditions which do not appear in the writing itself, but which derive from the policy of insurance and are evidenced only by the self-serving affidavits filed in support of appellant's motion for summary judgment.

Appellant now suggests that the District Court gave insufficient weight to certain assertions contained in its affidavits and placed undue emphasis on portions of appellee's affidavits. (Pages 4, 5, 12 and 13 of Appellant's Brief.)

The statements which appellant claims were overlooked or underemphasized are all at variance with or seek to supplement the agreement of the parties as set forth in the settlement document. Their probity and admissibility is therefore limited by the parol evidence rule.

The Connecticut Courts have consistently held that, as a matter of substantive law, such assertions as those quoted on pages 4 and 5 of appellant's brief are ineffective to vary the terms of a written agreement. **Jarvis v. Cunliffe**(1953), 140 Conn. 299; **Maier v. Arsenault** (1953), 140 Conn. 364; **Shelton Yacht & Cabana Club, Inc. v. Suto** (1963), 150 Conn. 251. This view is consistent with the weight of authority. **Wigmore on Evidence**, Volume IX, sec. 2400 et seq. (Third Ed., 1970.)

The Federal Courts have also held that proper application of the parol evidence rule may require the denial of a motion for summary judgment. **Ford v. Luria Steel & Trading Corp.**, 192 F2d 880 (CA 8th, 1951); **Paramount Pest Control Service v. U. S.**, (1962) 304 F2d 117; **Alger v. U. S.**, 25 F.R. Serv. 947, F2d 519 (CA 5th, 1958); 6 **Moore's Federal Practice**, sec. 56.15, p. 2286.

It is submitted, therefore, that appellant's motion for summary judgment was properly denied.

Appellee's motion for summary judgment, on the other hand, was based not only upon the pleadings and affidavits, but also upon the exhibits, including the settlement agreement itself, and the oral arguments and interrogation of counsel by the Court.

The settlement agreement is unequivocal. It contains no preconditions to payment and no requirement (such as was contained in the insurance policy) that respondent construct a new building identical to that which was destroyed.

Appellant's claim (on pages 12 and 13 of its brief) that the District Court found "as established facts, certain claims set forth in the affidavits" submitted by appellee, cannot be taken seriously. In both instances cited, the "claims set forth in the affidavits" are supported by independent evidence which is not in dispute.

The primary reference to new construction in the settlement document is in the third "Whereas" clause where it is said:

> "WHEREAS, insured **intends** to construct a new building . . . in order to replace the building which was destroyed **and construction of the new building has already commenced** . . ." (Emphasis supplied).

It is therefore not true that the District Court's finding as a fact not in dispute, that the new building was already under construction when the settlement agreement was signed, derives solely from Mr. Heyman's affidavit.

As a matter of fact, it should be noted that notice of completion of the building was given to appellant on August 22, 1973, less than three weeks after the settlement agreement was signed. Clearly, therefore, construction of the new building must have been well under way when that agreement was signed.

Similarly, it is claimed that the District Court somehow gave undue weight to the statement in Mr. Heyman's affidavit that the settlement figure would not have been accepted if payment had been conditioned upon construction of a building identical to that which had been destroyed.

But, if it was clear (as stated in the settlement agreement) that the new building was under construction when the settlement document was signed, then it is not

unreasonable for the District Court to have inferred that its size was known to appellee, if not to appellant, at the time of signing of that document. And it requires but a small step of reason to conclude therefore, that appellee, fully aware that construction of a 4,000 square foot building was under way, would not have agreed to a settlement which was conditioned upon construction of a 14,000 square foot building.

The District Court might well have taken note of the additional fact that, if the insurance policy and the settlement agreement imposed the same conditions relative to "replacement" of the building destroyed, appellee would surely have brought suit on the policy for the full amount of the loss. With a more comprehensive remedy available under the policy, it is improbable that suit would have been brought on the settlement agreement.

This analysis is without reference to the additional question of appellant's opportunity or obligation to have inspected the new building foundation before signing the settlement agreement.

The District Court was in no way misled by the inadvertent omission of a line in the settlement agreement in the copy attached to the complaint. The full and complete language of the agreement was set forth in the briefs of both parties below and was accurately alluded to in the oral argument. The omission is inconsequential in any event and could have had no impact upon the Court's decision with respect to the motions for summary judgment.

Equally inconsequential is the claim that the settlement agreement should be construed against appellee because her attorney drafted it. Both parties to the agreement were ably represented by counsel. Neither party was at any disadvantage and it is pure happenstance that appellee's counsel drafted the final document.

It is submitted that the settlement agreement is clear and unequivocal and that appellee has complied in all respects with its terms.

It is further submitted that the following material facts may properly be found to be undisputed from all of the evidence before the District Court, and that these facts are all that is necessary to sustain appellee's claim:

1. Appellee suffered a loss by fire at premises owned by her and leased to Sears, Roebuck & Company.

2. The subject premises were insured against loss or damage by fire under a policy issued to appellee by appellant, which policy was in effect on the date of the loss.

3. A timely claim was filed by appellee with appellant in the form specified by the policy.

4. A dispute arose between the parties as to the actual amount of the loss, as a result of which no part of the claim was paid.

5. The parties entered into a settlement agreement wherein appellant agreed to pay at the times specified, and appellee agreed to accept, the compromise figure of $187,500.00 and each party agreed to waive her and its respective rights under the policy of insurance.

6. Appellant has paid the sum of $150,000.00 pursuant to the settlement agreement but, despite notice of completion of the walls and roof of the new building, as required by the settlement agreement, appellant has failed and refused to pay the balance of $37,500.00.

It is axiomatic that, where a moving party has supported a motion for summary judgment by appropriate means which are uncontroverted, a trial court is fully justified in granting the relief requested. **Williams v. Baltimore & O. R. Co.**; 5 F.R. Serv. 2d 919, 303 F2d 323 (CA 6th, 1962).

II. APPELLEE WAS UNDER NO OBLIGATION, EITHER UNDER THE POLICY OF INSURANCE OR THE SETTLEMENT AGREEMENT, TO CONSTRUCT A NEW BUILDING IDENTICAL TO THAT WHICH WAS DESTROYED.

It is appelee's position that any discussion of the terms of the policy of insurance is totally irrelevant to this action founded on the settlement agreement. Nevertheless, appellee suggests that the result would have been the same even if the action had been brought with reference to the provisions of the policy of insurance and that, in no event would she have been required to construct a new building identical to that which was destroyed, as a precondition to payment, under either the policy or the agreement.

There are at least three cases which are almost precisely in point and which hold that the term "replace" does not mean "replace with something identical." To require that the new building be identical to the damaged building would be to read more into the word "replace" than is justified. "To replace does not necessarily mean to duplicate" . . . to replace means "to put a substitute in place of; cause to supply the place of in any manner; as, to replace butter with oleomargarine." **Lannon et al v. Mayor and Board of Aldermen of Town of Tullahand**, 290 S.W. 9, 10 (Tenn. 1927). In **Lannon**, a covenant to replace a damaged building was deemed sufficiently performed even though the new building was considerably smaller than the original building.

In **Ruter v. Northwestern Fire & Marine Insurance Co.**, 72 N.J. Super. 467, 178A 2d 640 (1962), the court found that the insured was entitled to be paid according to the replacement provision of an insurance contract even though the premises were sold by the insured to another in their damaged condition and the purchaser

replaced the damaged premises with a building only a fraction the size of the original.

See also **United States Mortgage & Trust Co. v. New York Dock Co.**, 108 Misc. 120, 177 NYS (1919), in which the court stated: "I do not think it should be held that the words 'replacing property damaged or destroyed' should be narrowly construed as being the literal replacement on the same site of the same kind of a structure". In **New York Dock Co.** the defendant was obligated by a mortgage to use insurance proceeds for fire loss for "replacing property damaged or destroyed." The court held that the mortgagor had a right to use the insurance money from damage to an elevator in a building to erect a pier, noting that "the requirement is complied with if the insurance money is spent in the construction of property suitable for use of the Dock Company, although such property is not of the same character as that destroyed and even though it be not located on the same spot."

Thus, in cases where the Court is called upon to define the word "replace" in a context similar to that before this Court, the courts have consistently held that the term "replace" does not require identity of size or use; indeed, the term does not even require construction of a structure of similar character.

That the term "replace" does not necessarily import substitution of an identical thing is borne out not only in the case law but also in various dictionary definitions. The term "replace" is variously defined as follows: "to take the place of, become a substitute for" **The Oxford English Dictionary**; "to put in place of; provide a substitute or successor for" **Webster's Third New International Dictionary**; "to take the place of, to succeed" **The Random House Dictionary of the English Language**; "to put something new in place of" **Webster's New Collegiate Dictionary**; "to substitute something new or workable

for that which is lost" **The American Heritage Dictionary of the English Language**. Thus, replace means to put something new in the place of, to substitute. It does **not** mean to put something identical in the place of, or to substitute something **identical**.

And in this case, of course, there is no commitment or obligation to "replace", merely a statement of "intent" in the third "Whereas" clause of the settlement agreement.

CONCLUSION

The judgment of the District Court, rendered on the cross motions of the parties for summary judgment should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN,	:	
	:	
Plaintiff,		
	:	
vs.		CIVIL ACTION
	:	
COMMERCE AND INDUSTRY INSURANCE COMPANY,	:	NO. 75-7230
		CERTIFICATION OF SERVICE
Defendant	:	

I, Lawrence P. Weisman, attorney for the plaintiff-respondent in the foregoing action, hereby certify that on June 30 ,1975, I deposited in the United States Mail, postage prepaid, three copies of the brief for plaintiff-respondent in the above matter addressed to:

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Dated ~~at~~ Bridgeport, Connecticut this 30th day of June, 1975.

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